(1) Supreme Court, U.S.
FILED

No. 021688 JAN 14 2003

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

CHARLENA SINGLETON,

Petitioner,

v.

AL CANNON, SHERIFF, CHARLESTON COUNTY

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Chalmers C. Johnson
Counsel of Record for Petitioner
Chalmers Johnson Law Firm, LLC
39 Broad Street, Suite 203
Charleston, South Carolina 29401
TEL (843) 723-8288
FAX (843) 853-8749

3 OPP

QUESTIONS PRESENTED

1. Whether the Court should have considered and responded to the Petitioner's Motion for relief from Judgment pursuant to Rule 60, Federal Rules of Civil Procedure.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATUTORY PROVISIONS AT ISSUE . . . 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Denton v. Hernandez, 504 U.S. 25 (1992) 8,9,10,11,15

Neitzke v. Williams, 490 U.S. 319, at 325, 328 (1989) 11

Statutes

28 U.S.C. 1254(1) 1

28 U.S.C. 1915(d) 9

28 U.S.C. 2111 11,12,13,14

42 U.S.C. 2000e, et seq. 2

Other Authorities

Rule 60, Federal Rules of Civil Procedure i,1

OPINIONS BELOW

The Court of Appeals wrote an unpublished Opinion in this case, affirming based on the reasoning in the District Court Judge's Order filed on April 24, 2002. A copy of the unpublished Opinion is included in the Appendix, as is the Order of April 24, 2002 by Judge Norton, United States District Court Judge.

JURISDICTION

On September 4, 2002, the Appeals Court for the Fourth Circuit affirmed the District Court's denial of Ms. Singleton's Motion to set aside a Judgment pursuant to Rule 60, FRCP. The Court denied her timely filed petition (Orders of 9-20-02 and 9-25-02 concern timeliness of filing) for rehearing on October 16, 2002. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

None.

STATE STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the U.S. Code:
28 U.S.C. 2111

Harmless Error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Charlena Singleton was terminated from her job with the Charleston County Sheriff's office on September 9, 1997. She timely filed a Charge of Discrimination, with Equal Employment Opportunity Commission, alleging that she was terminated because of her age, and in violation of Title VII of the Civil Rights Act of 1964, as amended. The EEOC issued a Right to Sue letter on February 2, 1999, conferring jurisdiction of the U.S. District Court on this case. Ms. Singleton received it on February 5, 1999. She interviewed with a number of attorneys, but was unsuccessful in that the

attorneys with whom she interviewed would not agree to represent her.

Ms. Singleton was aware of the 90 day deadline for filing suit in the United States District Court, and that her time was running out, as attorney after attorney declined to accept her case. Prior to the filing deadline, Ms. Singleton contacted the EEOC, and spoke with an EEOC employee, Ms. Bailey about filing the case Pro se in order to meet the filing deadline. However, she did not know where to file the case, or the physical location of the Courthouse where it could properly be filed. Ms. Singleton asked Ms. Bailey to direct her to the proper place to file her case. Instead of directing Ms. Singleton to the Charleston office of the U.S. District Court, Clerk of Court, Ms. Bailey told Ms. Singleton that she would have to file her Complaint in Greenville, and gave her the address of the EEOC's Greenville Local office. Ms. Bailey told Ms. Singleton that there was no office in Charleston where she could file. When Ms. Singleton asked for a listing of addresses for Federal District Courts in South Carolina, Ms. Bailey told her that she did not have such a list.

Ms. Singleton then called a number listed for the U.S. District Court in the phone book. The number apparently was to a division of the U.S. District Court which dealt with criminal cases. The employee who spoke with Ms. Singleton told her that she could not file her

case there, but did not direct her to the U.S.D.C. Clerk of Court's office. Ms. Singleton continued to call local attorneys, all of whom declined to take her case, but none of whom directed her to the U.S.D.C. Clerk of Court's office in Charleston. Finally, Ms. Singleton spoke with a secretary or assistant to one attorney who told her the correct phone number for the Clerk of Court for the U.S. District Court, Columbia Division. Upon contacting the Clerk of Court in Columbia, Ms. Singleton finally learned the address of the Charleston U.S.D.C. Clerk of Court. The same day that she learned the address to the Charleston Clerk of Court, Ms. Singleton went there, obtained the proper paperwork for filing a case Pro se, and filed her case. Unfortunately, by that time, it was about six months past the Filing Deadline. Judge Carr, one of the U.S.D.C. Magistrate Judges in Charleston, issued an Order on November 22, 1999, allowing Ms. Singleton to proceed Pro se, and waiving the filing fee.

After Ms. Singleton had filed her case, and had it properly served, the Defendant apparently failed to file an Answer. She was able to retain the services of an attorney, at that point, Mendel J. Davis, of Mt. Pleasant, SC, who filed a Motion for an Order of Default, and requested a damages hearing. On February 14, 2000, the Defendant's attorney filed a Motion to dismiss Ms. Singleton's suit for lack of Subject Matter jurisdiction.

Ms. Singleton's attorney argued for equitable tolling. He argued that Ms. Singleton was ignorant of the filing procedures, that she made numerous attempts to find an attorney, and to get this information from the EEOC, which refused to even tell her the address of her local U.S.D.C. Clerk of Court's office. In the response brief, Singleton's attorney cited to applicable cases concerning equitable tolling, and noted that the Fourth Circuit had allowed equitable tolling in situations where the Plaintiff had relied on incorrect information from a federal agency like the EEOC.

The U.S.D.C. Magistrate, Judge Carr, issued a Report and Recommendation on April 11, 2000. He recommended that equitable tolling not be applied to Ms. Singleton's case, and that it be dismissed for lack of subject matter jurisdiction, due to the Complaint having been filed outside of the filing deadline.

Ms. Singleton filed Objections to the Magistrate's Report and Recommendation on April 28, 2000. The U.S. District Judge, David C. Norton, issued an Order adopting the Magistrate's Report and Recommendation on May 3, 2000, and dismissing the case as untimely filed.

In July of 2000, Ms. Singleton terminated Mr. Mendel Davis as her attorney, and received her file from him. On December 4, 2001, she wrote to Judge Carr, notifying him that she wanted to "re-open" her case. He

BEST AVAILABLE COPY

responded by sending her a copy of Rule 60 of the Federal Rules of Civil Procedure on January 2, 2002. Ms. Singleton, acting Pro se, submitted a hand written letter to Judge Carr, describing some of her prior attorney's actions in the case. That letter is recorded as document Twenty Seven (27) in the Court's Record, and consists of eighty two (82) pages. It included several copied case opinions that Ms. Singleton claimed gave her grounds to request the "re-opening" of her case. On April 9, 2002, Judge Carr issued an Order denying her motion on the grounds that her letter did not contain any information to support one of the reasons set forth under Rule 60 which would give rise to just cause for the reopening setting aside of a judgment. Ms Singleton, still acting Pro se, then submitted Documents 30 and 31 to the Court. Document 30 is a hand written motion to "re-open" her case based on Rule 60 FRCP. Document 31 is a hand written letter, with attachments of medical documents showing that Ms. Singleton had had some serious medical treatment some months prior. The hand written letter states, in pertinent part "Enclosed is proof of my statement [concerning her medical treatment] This will give you a reason why I was not following up on the case after April 2002. However I retain an Attorney in June 2001 up until March 12, 2002." Judge Norton issued the final order in this case on April 24,

2002, the same day she had submitted her medical documentation and her "motion" under Rule 60, FRCP, denying the Plaintiff's motion. The Order notes only that Ms. Singleton had submitted medical records, and that she had not presented any grounds to support her motion.

Ms. Singleton filed a Notice of Appeal on May 10, 2002, appealing Judge Norton's Order of April 24, 2002. She pursued her appeal pro se, submitting a hand written informal brief. The Appellee submitted a responsive brief. The Appellate panel issued its unpublished opinion on September 4, 2002, affirming Judge Norton's Order. Singleton then retained the undersigned, who timely filed a Petition for Rehearing. The Petition for Rehearing was denied on October 16, 2002 without further comment by the U.S. Court of Appeals for the Fourth Circuit on October 16, 2002.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE U.S. DISTRICT COURT AND THE FOURTH CIRCUIT COURT OF APPEALS FAILED TO ABIDE BY THE SUPREME COURT OPINION IN DENTON

V. HERNANDEZ WHEN THEY FAILED TO CONSIDER THE PETITIONER'S ARGUMENTS CONCERNING HER MOTION TO SET ASIDE JUDGMENT.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE APPELLATE COURT FAILED TO PROPERLY EXAMINE THE RECORD AS REQUIRED IN 28 U.S.C. 1112 WHEN THEY FAILED TO CONSIDER THE PETIONER'S ARGUMETS CONCERNING HER MOTION TO SET ASIDE JUDGMENT.

I. The Appellate Court and the U.S. District Court failed to consider the Petitioner's argument, in contradiction of this Court's ruling in Denton v. Hernandez, 504 U.S. 25 1992.

The Petitioner filed her motion to set aside the judgment dismissing this case, pro se. Though the documents she submitted were hand written and filed, more in the form of a letter to the judge than the normally accepted form of a motion, the district court judge clearly recognized the motion for what it was. However, the U.S. District Court Judge dismissed the petitioner's motion without even considering the factual and legal arguments she did submit. This is evident from the language

of this order, which shows that he dismissed the motion because, as he erroneously stated, the petitioner, Ms. Singleton, had not submitted any argument, and had only submitted some extraneous medical documents. The Appellate Court adopted the decision, and the reasoning behind it in its Judgment of September 4, 2002. Then the Appellate Court denied the Petition for Rehearing, in which the Petitioner brought the oversight to the Court's attention. Essentially, it appears that the court simply failed, and then refused, to even read or consider Ms. Singleton's arguments, thereby denying her motion without giving her a chance to present her case in support of the motion.

In Denton v. Hernandez, 504 U.S. 25, 1992, this Court reversed a decision by the district court, which dismissed the petitioner's complaint as frivolous, under 28 U.S.C. 1915(d), which allows a Court to dismiss an *in forma pauperis* complaint "if satisfied that the action is frivolous." The petitioner, who was an inmate, alleged that prison officials and inmates had combined efforts to drug and rape him multiple times. The petitioner claimed to have been unconscious through the attacks, and pointed to what he perceived to be needle marks on his body, and what he claimed to be fecal matter and semen on his clothing. The District Court found the Petitioner's story to be incredible, and dismissed it as frivolous. The

Supreme Court disagreed, stating that the District Court could not dismiss a claim simply because it would likely not survive Summary Judgment. "To dismiss them as frivolous without any factual development is to disregard the age old insight that many allegations might be 'strange, but true; for truth is always strange, stranger than fiction.' Lord Byron, Don Juan, Canto XIV, stanza 101 (T. Stephan, E. Stephan, W. Pratt eds. 1977)." Id.

Like Denton, the Petitioner, Ms. Singleton, was proceeding without an attorney in her motion to the Court. However, even without the benefit of the guidance of a professional and an officer of the Court, she was able to submit at least a coherent argument supported by case law that she had gleaned from the internet, and which was pertinent to the issue that she addressed in her motion. Ms. Singleton's motion was much less of a stretch of the imagination than Denton's claims. But, as in Denton's case, the District Court refused to even review her arguments to determine whether they were persuasive or compelling, or deserved further inquiry. The Appellate Court did the same thing, by adopting the reasoning and decision of the District Court. The Denton v. Hernandez opinion from this Court prohibits a refusal by the Court to allow a citizen, who is seeking access to the American Judicial system to summarily dismiss, absent findings that the allegations set forth were so extremely

incredible as to be "fanciful," "fantastic," and "delusional." Neitzke v. Williams, 490 U.S. 319, at 325, 328 (1989). Ms. Singleton's arguments in support of her motion to set aside judgment are certainly not fanciful, fantastic, or delusional. Her submissions to the Court, though obviously drafted by a layperson rather than an attorney, are clear and, considering her status as a non-lawyer, adequately researched. The Courts which have reviewed this case to date certainly could have understood her arguments with little difficulty, and at least have given them consideration rather than simply blatantly ignoring their existence. The lower Courts' actions and decisions are in conflict with this Court's decision in Denton v. Hernandez, 504 U.S. 25 (1992). The Petitioner respectfully requests that the U.S. Supreme Court accept this case for review and issue a Writ of Certiorari to the Fourth Circuit Court of Appeals to consider the issues raised herein.

II. The Appellate Court's Decision implies a violation of 28 U.S.C. 2111 in that the Court did not examine the record to the degree required by 28 U.S.C. 211 prior to making a judgment.

The Appellate Court's Judgment notes that it had reviewed the record. However, its affirmation of the U.S. District Court Judge's decision, adopting the same

reasoning as the decision, implies that the review undertaken could not have been a close examination. Upon an examination of the record, beyond a brief review of the titles of the documents, (as the case was filed pro se, the titles do not aptly describe the contents of the Plaintiff's filings) the Court would have found that Ms. Singleton did, in fact, submit both legal argument and factual argument in support of her motion to set aside the judgment. This fact directly contradicts the U.S. District Court's finding that no such documents had been submitted.

By statute, the Appellate Court is required to examine the record without regard to errors or defects that do not affect the substantial rights of the parties. This language implies a close examination of the content of the documents, despite defects in form. Though such language is meant to apply to any case before the Courts, it is most applicable to cases which were filed and argued Pro Se, like Ms. Singleton's. A lay person may not grasp the details of procedure or form; however, a reasonable, intelligent person can certainly write a logical argument and grasp the idea of precedent, as Ms. Singleton did. The statute, 28 U.S.C. 2111 requires that the Court look beyond the form of the document when reviewing a case, to the substance and content of the arguments therein.

In adopting the District Court's decision, (finding that Singleton had failed to submit any factual or legal argument to support her position) even after Singleton's Petition for Rehearing directly and clearly pointed them to the very documents in question in the record, the Appellate Court, though its opinion states that it did review the order, either did not review it, or gave it only the most cursory glance, rather than the more in depth examination of content called for by congressional mandate set forth in 28 U.S.C. 2111, which states:

On the hearing of any appeal or Writ of Certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. 28 U.S.C. 2111

Statute 28 U.S.C. 2111 is a statute, which addresses harmless error. The Appellate Court could very well have simply reviewed Ms. Singleton's arguments and determined that the Court's dismissal was appropriate for other reasons. The Courts may decide that the lower Court's decision was correct, though the reasoning set forth in the District Court's Order was flawed. This would result in harmless error. But, the Appellate Court could not logically have examined the record to the extent

required by 28 U.S.C. 2111 and still adopted the District Court Judge's *reasoning,* as well as affirming the decision. By failing to appropriately examine the record to the extent required by 28 U.S.C 2111 when considering the Petitioner's appeal, the Appellate Court violated that Congressional legislative mandate. The Petitioner therefore respectfully requests that eh Court issue a Writ of Certiorari and accept this case to review whether the failure of the Court to review the record as required by 28 U.S.C. 2111 deprived the Plaintiff of her rights secured by that statute.

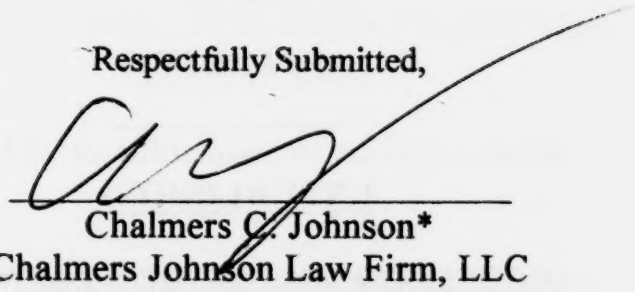
CONCLUSION

The decisions of the U.S. District Court and the Fourth Circuit Court of Appeals in this case are in conflict with both Congressional Statutory law (28 U.S.C. 2111) and with prior opinions rendered by the United States Supreme Court (Denton v. Hernandez, 504 U.S. 25 (1992).) Our country, the United States of America, offers freedom and justice *for all.* The Courts are our citizens' venue for resolving disputes among themselves, or with the Government. The Courts in this case have turned a blind eye and a deaf ear to Ms. Singleton. Perhaps it is easy to lose patience with Pro Se or in forma Pauperis petitioners, as their arguments and filings often lack what finesse or adherence to protocol and form an

attorney's hand may lend to the arguments. However, the Courts serve the people in the United States of America, not the other way around. The people have a right to be heard when they come to the Courts seeking closure to an issue they deem important enough to bring before the judiciary. Where the Courts are allowed to shirk their duty to impartially decide conflicts brought before them, by simply ignoring those seeking a forum for their complaints, the very fabric of our society, the guarantees of equality and personal access to the system, is injured. Ms. Singleton deserves consideration of and a response to the arguments that she so painstakingly researched and presented to the District Court. Whether she prevails or the motion is dismissed, in the end, is not the point. The individual United States Citizen's right to access to the Courts and equal protection under the law should never be prioritized below the convenience of those chosen to serve them.

For the reasons set forth above, Petitioner CHARLENA SINGLETON respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,



Chalmers C. Johnson*
Chalmers Johnson Law Firm, LLC
39 Broad Street, Suite 203
Charleston, SC 29401
TEL (843) 723-8288
FAX (843) 853-8749

*Member, Supreme Court Bar
Counsel of Record for Charlena Singleton

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1532

CHARLENA SINGLETON,

Plaintiff – Appellant,

versus

AL CANNON, Sheriff, Charleston County,

Defendant – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (CA-99-3636-2-18)

Submitted: August 29, 2002
Decided: September 4, 2002

Before WIDENER and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curium opinion.

Charlena Singleton, Appellant Pro Se. Bernard Eugene Ferrara, Jr., CHARLESTON COUNTY ATTORNEY'S OFFICE, North Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIUM:

Charlena Singleton appeals the district court's orders denying her motion to reopen her case and her motion for relief from judgment pursuant to Fed. R. Civ. P. 60. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Singleton v. Cannon, No. CA-99-3636-2-18 (D.S.C. Apr. 24, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

FILED
APR 24 2002
LARRY W. PROPES, CLERK
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Charlena Singleton, Plaintiff, -versus- Al Cannon, Sheriff, Charleston County Sheriff,	C.A. No. 2:99-3636-18AJ **ORDER**

This matter is before the court pursuant to a pro se letter "motion" to reopen the above referenced case due to "mistakes, inadvertence and excusable neglect."

Plaintiff originally filed her case on November 2, 1999. She was represented by Mendel J. Davis, Esq. of the Charleston Bar. After the close of discovery, defendant made a Motion to Dismiss which was granted by the Magistrate Judge on April 11, 2000.

Subsequently, plaintiff objected to the Magistrate Judge's Report and Recommendation on April 28, 2000. Thereafter, this court adopted the Magistrate Judge's Report and Recommendation and dismissed this case on May 4, 2000.

Plaintiff has appended some medical records to her "motion" which seem to reflect that she had a knee replacement in December of 2000 and experienced some infectious complications in January 2001.

Plaintiff presents this court with no grounds to reopen her case; therefore, plaintiff's "motion" to reopen her case is DENIED.

AND IT IS SO ORDERED.

s/ _____
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
April 24, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 16, 2002

No. 02-1532
CA-99-3636-2-18

CHARLENA SINGLETON

Plaintiff – Appellant

v.

AL CANNON, Sheriff, Charleston County

Defendant – Appellee

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 20, 2002

No. 02-1532
CA-99-3636-2-18

CHARLENA SINGLETON

Plaintiff – Appellant

v.

AL CANNON, Sheriff, Charleston County

Defendant – Appellee

ORDER

Appellant has filed an untimely petition for rehearing.

This Court strictly enforces the time limits for filing petitions for rehearing and rehearing en banc.

The Court denies the petition for rehearing as untimely filed.

For the Court – By Direction

/s/ Patricia S. Connor

CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 20, 2002

No. 02-1532
CA-99-3636-2-18

CHARLENA SINGLETON

Plaintiff – Appellant

v.

AL CANNON, Sheriff, Charleston County

Defendant – Appellee

ORDER

On September 20, 2002, an order was filed denying appellant's petition for rehearing as untimely. On September 25, 2002, appellant's newly retained counsel filed an affidavit indicating timely filing of the

appellant's petition for rehearing on September 18, 2002.

The Court vacates the order of September 20, 2002, due to administrative error. The petition for rehearing is considered timely filed as of September 18, 2002.

For the Court – By Direction

/s/ Patricia S. Connor

CLERK

Supreme Court, U.S.
FILED

No. 02 1688 JAN 14 2003

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

CHARLENA SINGLETON,

Petitioner,

v.

AL CANNON, SHERIFF, CHARLESTON COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL APPENDIX

Chalmers C. Johnson
Counsel of Record for Petitioner
Chalmers Johnson Law Firm, LLC
39 Broad Street, Suite 203
Charleston, South Carolina 29401
TEL (843) 723-8288
FAX (843) 853-8749

16 pp

APPENDIX F

SCANNED

FILED
APR 11 2000
LARRY W. PROPES, CLERK
CHARLESTON, SC

Charlena Singleton,	)	C.A. No. 2:99-3636-18AJ
	)	
Plaintiff,	)	
	)	
-versus-	)	**REPORT AND**
	)	**RECOMMENDATION**
Charleston County Sheriff's Office, Al Cannon,	)	
	)	
Defendant.	)	

This action brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et. *seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII),42 U.S.C. § 2000e, by a former employee of defendant Charleston County Sheriff, Al Cannon (the Sheriff), proceeding *in forma pauperis,* is before the undersigned for a report and recommendation on the defendant's dispositive

motion filed February 14, 2000. 28 U.S.C. § 636(b).

The plaintiff, Charlena Singleton (Singleton), filed this case *pro se'* on November 2, 1999, against the Sheriff alleging that she was discriminatorily fired on September 9, 1997. The defendant was served on December 15, 1999, and when no answer was filed in a timely manner, the plaintiff, through her retained counsel, filed an affidavit of default on January 28, 2000, and moved for an Order of default on February 4, 2000. On February 14, 2000, the defendants filed a motion to dismiss the plaintiff's law suit for lack of subject matter jurisdiction. A hearing on the two motions was held on March 31, 2000, at which time the plaintiff filed a memorandum in opposition to the defendant's motion.

Consideration first turns to the plaintiff's motion for an Order of Default.

The entry of default and default judgment is governed by Federal Rule of Civil Procedure 55, which reads in pertinent part:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

---

1. The plaintiff subsequently retained Mendel J. Davis, Esq., to represent her in this matter.

(b) Judgment. Judgment by default may be entered as follows:
(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.
(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor ....

Generally, the entry of default and default judgment is disfavored because it prevents a plaintiff's claims from being decided on the merits. 10 Wright, Miller & Kane, Federal Practice and Procedure § 2681 (1983). "There is a strong public policy, supported by concepts of fundamental fairness, in favor of trial on the merits, see, e.g., Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir. 1980), particularly when monetary damages sought are substantial." Swink v. City of Pagedale, 810 F.2d 791, 792 n. 2 (8th Cir.1987), *cert. denied*, 483 U.S. 1025, 107 S.Ct. 3274, citing 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2693, at 482-85 (2d

Ed. 1983). Accordingly, entry of judgment by default is a drastic remedy which should be used only in extreme situations. Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928, 88 S.Ct. 2287.

"Where a defendant appears and indicates a desire to contest an action, a court may exercise its discretion to refuse to enter default, in accordance with the policy of allowing cases to be tried on the merits." *See, e.g.*, Lee v. Brotherhood of Maintenance of Way Employees, 139 F.R.D. 376, 381 (D.Minn. 1991), citing 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2682, at 411 (2d Ed. 1983).

The court is required to exercise "sound judicial discretion" in deciding whether to enter default judgment. "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when defendant is technically in default." Id. The court should consider a number of factors in determining whether to enter default and default judgment, including: (1) prejudice to the plaintiff if default judgment is not granted; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's delay was the result of culpable misconduct. *See e.g.*, Emasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987).

In the final analysis, default judgments

are not favored in the law, and the entry of such a judgment is only appropriate where there has been a clear record of delay or contumacious conduct. *See,* e. *g.,* United States on Behalf of and for the Use of Time Equipment Rental and Sales, Inc. v. Harre, 983 F.2d 128, 130 (8th Cir. 1993).

Here the facts do not warrant the entry of default. There is no evidence of prejudice to the plaintiff by the short delay occasioned here, and the issues raised by the defendant appear to be meritorious. Accordingly, even though it appears that the defendant himself was less than diligent in attending to his legal affairs, default would not be appropriate.

Turning next to the defendants motion to dismiss, it appears that the defendant is asserting that this court lacks jurisdiction because the plaintiff has not filed this action in a timely manner.

Singleton submitted to the court with her complaint a copy of her right-to-sue letter dated February 2, 1999. Since this action was not filed until November 2, 1999, the defendant asserts that this action is untimely. The plaintiff in turn has responded citing her extensive efforts to find legal assistance to bring this action and asserts that she was "excusably ignorant of the filing requirements. She also contents that her delay in filing this action was the result of her, "lack of funds, lack of knowledge of the legal system and its requirements, and her inability to obtain assistance from any source. . ." Accordingly she

claims that the ninety-day period should be tolled.

No more than ninety (90) days before the commencement of a civil action for employment discrimination covered by the EEOC or the ADEA, the aggrieved party must have received a "Right-to-Sue" letter from the EEOC. 42 U.S.C. § 20OOe-5(f)(1); Davis v. Virginia Commonwealth Univ., 180 F.3d 626 at 628 (4th Cir. 1999). Generally, and specifically in this case, the notice of right-to-sue letter states on its face, "You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this Notice;** otherwise, your right to sue based on this charge will be lost." (Emphasis in original).

The ninety-day filing period generally commences on the date that the aggrieved party actually receives the EEOC's right-to-sue letter. See, *e.g.*, Biester v. Midwest Health Servs., Inc., 77 F.3ci 1264, 1267 (10th Cir. 1996). Compliance with this time requirement is not a jurisdictional prerequisite; rather, it is a statutory precondition to suit that functions like a statute of limitations. Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983). When the defendant denies or contests a timely filing, the plaintiff must prove this condition precedent.

> "[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the Moving party is entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (quoting Fed.R.Civ.P. 56(c)). "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324. In determining whether this showing has been made, the factual evidence and all inferences to be drawn therefrom are reviewed in a light most favorable to the party opposing the motion. See, Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). Finally, summary judgment is not appropriate if the resolution of material issues depends upon credibility determinations. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979).

Here the defendant has challenged the timeliness of the suit, and the plaintiff has admitted the failure to file this action in a timely fashion. She seeks, however, to excuse the delay by pointing to her own limitations and inability to obtain counsel and to the local EEOC office's inability to give her more information than that set out in the Right-to-Sue letter.

Specifically, the plaintiff asserts in her various pleadings the following:

1. She was mislead by attorneys.

2. She met with approximately 27 attorneys at unspecified times who told her they did not have time to take the case, that her time to file had run, that they did not want to take her money if they could not help her, that they did not take cases in the Charleston area, or that she should go to the EEOC and amend her complaint. One attorney told her to tell the court that she had been mislead.

3. The right-to-sue letter did not include the address of any courts in which filing a lawsuit would be proper and did not include any information about the procedure for filing a Lawsuit. At some unspecified time she contacted the EEOC office in Greenville and in Charlotte asking for lists of court addresses where she could file her lawsuit, and she was told the EEDC did not provide this information. She contacted the EEOC in October, 1999, and she was advised to file the case even though time had expired.

4. During the last week in October 1999, an investigator told her the address of the federal court in Columbia. She contacted the court in Columbia the last week in October, and the clerk sent her papers to file. The clerk of court in Charleston allegedly told her, that it did not handle anything but criminal cases.

5. The plaintiff filed her complaint with this court in November 1999 immediately after receiving documents from the clerk of court.

Title VII's limitation period is not absolute, but is subject to "equitable modification." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Notably, the doctrine of equitable tolling allows a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, she is unable to obtain vital information bearing on the existence of her claim. Hamilton v. Komatsu Dresser Indus., 964 F.2d 600, 605 (7th Cir. 1992) (citing Wheeldon v. Monon.Corp., 946 F.2d 533, 536 (7th Cir. 1991)). "A plaintiff's excusable ignorance of the filing deadline, when combined with a lack of prejudice to the defendant, will commonly make equitable tolling appropriate." Bracy v. Helene Curtis, Inc., 780 F.Supp. 568, 570 (N.D.Ill. 1992).

Equitable tolling is premised on the plaintiff's excusable neglect, which may or may not be attributable to the defendant. Further, when an administrative agency misleads a complainant, particularly one who is without the benefit of counsel, equitable tolling may be justified. See, e.g., Warren v. Department of the Army, 867 F.2d 11.56, 1160-61 (8th Cir. 1989) (permitting equitable tolling of the statute of limitations in Title VII action in part because of misleading right-to-sue letter issued by EEOC); Early v. Bankers Life & Casualty Co., 959 F.2d 75, 81 (7th Cir. 1992) (citing misleading conduct by the EEOC as a basis for equitable tolling); Blumberg v. HCA Management Co., 848 F. 2d 642, 644

(5th Cir. 1988) (finding that misleading information from the EEOC may justify equitable tolling) , *cert. denied,* 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989); Martinez v. Orr, 738 F.2d 1107, 1111-12 (10th Cir. 1984) (finding equitable tolling appropriate where notice from EEOC misled pro se claimant regarding the finality of EEOC action).

The Fourth Circuit Court of Appeals has discussed the tolling of the limitations periods in the context of an EEOC claim as follows:

> The limitations period set forth in section 626(d) of the ADEA may be subject to equitable modification when warranted by the conduct of the employer. Such modification has two possible rationales: equitable tolling and equitable estoppel. Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights. See, Naton v. California, 649 F.2d 691 (9th Cir. 1981).

Felty v. Graves-Humphreys Co. 785 F.2d 516 (4th Cir. 1986)

The facts of this case, however, are not

similar to those cases in which equitable relief has been granted a plaintiff.2

---

2. The plaintiff in an attempt to bolster her position cites the opinion in Lane v. Wal-Mart Stores East, Inc. in which Wal-Mart attacked the plaintiff's administrative filing as untimely. The court dismissed the attack noting the plaintiff had filed within the 300 day period allowed for a deferral state, but as an aside discussed tolling. This discussion does not help the plaintiff, but is quoted here for completeness. "'While Wal-Mart correctly characterizes the Fourth Circuit's view that equitable tolling is 'a narrow limitations exception,' Olson v. Mobil Oil Corp., 904 F.2d 198, 201 (4th Cir. 1990), such a position does not preclude application of the doctrine to Lane's situation. Rather, the Fourth Circuit has recognized that the decision to grant such relief is within the discretion of the trial court and is dependent upon the particular circumstances of the case. See Cornett v. AVCO Fin. Servs., 792 F.2d 447, 450(4th Cir.1986)(interpreting the Supreme Court's decision in Oscar Mayer & Co. v. Evans, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), as authorizing the discretionary application of equitable tolling); Citicorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232, 234 (4th Cir.1981) (recognizing that equitable tolling principles might be applicable under certain situations).

"Equitable tolling may be applied "'where the defendant has wrongfully deceived

or misled the plaintiff in order to conceal the existence of a cause of action"; or where plaintiff has been excusably ignorant of filing requirements." Scheller v. Hydrotherm, Inc., 728 F.Supp. 377, 382 (D.Md. 1989)(quoting English v. Pabst Brewing Co. 828 F.2d 1047, 1049-50 (4th Cir.1987)). The Fourth Circuit has appreciated that a plaintiff's excusable ignorance could result from reasonable reliance on incorrect information provided by a federal agency, such as the EEOC. See, Vance v. Whirlpool Corp., 716 F.2d 1010, 1013 (4th Cir. 1983) (holding that the district court properly refused to dismiss claim, as the plaintiff's late filing resulted from his reasonable reliance on a Department of Labor employee's incorrect information); Citicorp Person-to-Person Financial Corp., 658 F.2d at 234 ("[A] clear violation of [a] regulation by [the] EEOC might warrant the finding of a tolling effect.").

"In this Court, Judge Northrop stated that "sound equitable reasons" existed for tolling when a plaintiff relied upon an incorrect limitations period calculated by the EEOC. Cherrey v. Thompson Steel Co., 805 F.Supp. 1257, 1261 n. 1 (D.Md. 1992). Similarly, the Fourth Circuit determined that the 300 day period should be tolled when the plaintiff's tardy filing resulted from the delay of the complaint once it reached the EEOC's office. Waiters v. Robert Bosch Corp., 683 F.2d 89, 92 (4th Cir. 1982) ('[The plaintiff] did everything required of him by the statute;

In Balwin County Welcome Center v. Brown, 466 U.S. 147 (1984), the United States Supreme Court explained the difference, "This is not a case in which a claimant has received inadequate notice, see Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974); or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, see, Harris v. Walgreen's Distribution Center, 456 F. 2d 588 (6th Cir. 1972) ; or where the court has led the plaintiff to believe that she had done everything required of her, see, Carlile v. South Routt School District RE 3-J, 652 F.2d 981 (10th Cir. 1981). Nor is this a case where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. See, Villasenor v. Lockheed Aircraft, Corp., 640 F.2d 207 (9th Cir. 1981); Wilkerson v. Siegfried Insurance Agency Inc., 621 F.2d 1042 (10th Cir. 1980); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979). The simple face is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

---

had his charge been properly processed, the charge would have satisfied the filing period.').

"Any delay on Lane's part in filing a verified charge esulted from her reasonable reliance on incorrect information provided to her by the EEOC." 69 F.Supp.2d 749, 754.

The undisputed facts here are that the plaintiff spoke to any number of attorneys. She knew of the time period in which to file her lawsuit, but she did not file it. The mere fact that plaintiff is proceeding *pro se* does not excuse her non-compliance with the statutory requirements for pursuing her claim. *See,* Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Vernon v. Cassadaga Valley, 49 F.3d 886 (2d Cir. 1995); Roberson v. Bowie State College, 899 F.Supp. 235 (D.Md. 1995). While the plaintiff seeks to neutralize her responsibility by casting vague aspersions on the efforts of the EEOC, the court and the numerous attorneys who took their time to review her file and talk with her, she presents nothing which indicates that she is entitled to equitable relief. She was not mislead by her employer, the EEOC, any attorney or by the court. The notice from the EEOC and every party told her to file her claim in the district court in a timely manner, but she did not.

In Baldwin County Welcome Center v. Brown, the United States Supreme Court cautioned, "Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver, 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980), '[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of

the law.'" 466 U.S. 147, 152, 104 S.Ct. 1723, 1726

Accordingly, for the aforementioned reasons, it is recommended that the action be dismissed as untimely and the respondents be granted judgment as a matter of law.

Respectfully submitted,

s/
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
April 11, 2000